In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-501

JAMES BROWN A/K/A JAMES FEDERICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction should be set aside and his indictment dismissed despite his plea of guilty, because the Criminal Division attorney who conducted the grand jury proceedings that resulted in the indictment was not properly authorized to conduct the grand jury inquiry.

Following a plea of guilty to one count of a ten-count indictment, petitioner was convicted of conspiracy to pass, possess, and deal in counterfeit United States obligations, in violation of 18 U.S.C. 371. He was sentenced to three years' imprisonment and was fined $2,500. The other counts were dismissed with the consent of the government. The court of appeals affirmed without opinion (Pet. 15).

The attorney who presented the case to the grand jury was Edward J. Levitt, a Criminal Division attorney assigned to the Field Office of the Organized Crime and Racketeering Section in the Southern District of New York.

Before conducting the grand jury inquiry, as *indicia* of his authority to represent the United States in the Southern District of New York, he filed a letter of authorization along with a copy of a duly executed oath of office with the clerk of the district court. The letter was similiar to the letters filed by the Criminal Division attorneys in *United States* v. *Wrigley*, 520 F.2d 362 (C.A. 8), certiorari denied, November 17, 1975, No. 75-5284. It specifically "authorized and directed" him to conduct in the Southern District of New York "any kind of legal proceedings, civil or criminal, including Grand Jury proceedings * * *, which United States Attorneys are authorized to conduct" (Pet. 7).

Prior to pleading guilty, petitioner moved to dismiss the indictment on the ground that prosecutor Levitt was not properly authorized to appear before the grand jury. The district court denied the motion in a memorandum opinion (Pet. 6-13; 389 F. Supp 959), and the court of appeals affirmed.

Petitioner's contention is foreclosed by his guilty plea, since a "plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects" (*United States* v. *Spada*, 331 F.2d 995, 996 (C.A. 2), certiorari denied, 379 U.S. 865). See also *Coleman* v. *Burnett*, 477 F.2d 1187, 1193-1195 (C.A. D.C.). The presence of unauthorized persons in the grand jury room, like other irregularities in the grand jury proceedings, is a waivable defect. See *Davis* v. *United States*, 411 U.S. 233, 236-237. See also the Advisory Committee's Notes to Rule 12(b)(2), Fed.R.Crim. P. Indeed, as this Court stated in *Tollett* v. *Henderson*, 411 U.S. 258, 267:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the

guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [v. *Richardson*, 397 U.S. 759].[1]

In any event, as we argued in our memorandum in opposition in *Wrigley*, *supra*, the claim that the Criminal Division attorney was not properly authorized to conduct the grand jury proceeding is without merit.[2] See *United States* v. *Wrigley*, 520 F.2d 362 (C.A. 8); *In re Subpoena of Persico*, 522 F.2d 41 (C.A. 2); *In re DiBella*, 518 F.2d 955, 958 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[1]There is no exception here like the state rule in *Lefkowitz* v. *Newsome*, 420 U.S. 283, 288-292, which permits an appeal despite a guilty plea. Nor is there any claim here, like the one in *Menna* v. *New York*, No. 75-5401, decided November 17, 1975, "that judged on its face—the charge is one which the [government] may not constitutionally prosecute" (slip op. 2, n. 2).

[2]We have sent a copy of our memorandum in opposition to counsel for petitioner.